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No. 87-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,
v.
THEODORE B. OLSON, EDWARD C. SCHMULTS
and CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL IN SUPPORT OF APPELLANT

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March 9, 1988

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MOTION OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL, FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Lawrence E. Walsh, Independent Counsel, respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consents of the attorney for appellant and of the attorneys for appellees Olson and Dinkins have been obtained. The consent of the attorney for appellee Schmults has been refused.[1]

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[1] It is not entirely clear that such consent is required. Supreme Court Rule 36.4 states that no consent need be had when the brief is presented for any federal agency authorized to appear in its own

Lawrence E. Walsh was appointed as Independent Counsel in the Iran/Contra matter pursuant to the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. § 591 *et seq.* ("the independent counsel statute")[2] on December 19, 1986. On March 5, 1987, Mr. Walsh received a parallel appointment as Independent Counsel in the Iran/Contra matter pursuant to the Attorney General's independent counsel regulation, 28 C.F.R. §§ 600, 601 (1987). On August 20, 1987, the United States Court of Appeals for the District of Columbia Circuit held that Mr. Walsh and his Associate Counsel have legal authority to pursue their investigation under the Attorney General's parallel appointment. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S.Ct. 753 (1988).

Believing that his appointment as Independent Counsel in the Iran/Contra matter can and should be upheld under the statute as well as under the Attorney General's regulation, which the court below deems subject to revocation "at any time," App. 18a,[3] Mr. Walsh asks to be heard as *amicus curiae* in support of the constitutionality of the independent counsel statute. He also seeks to call attention to an important factor not implicated in Independent Counsel Morrison's investigation which further supports the constitutionality of the independent counsel statute.

That statute contains two criteria pursuant to which the Attorney General may initiate the appointment of an independent counsel: § 591(b) requires the appointment of an independent counsel in certain matters involving specified high government officials, while § 591(c) provides that the Attorney general "may" call for an independent counsel in matters involving other persons "if the Attorney General determines that investigation of such person[s] by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest." The instant appeals relate to an independent counsel appointed under § 591(b); Mr. Walsh is the only independent counsel ever appointed under § 591(c).

When the Attorney General relies upon § 591(c) to initiate the appointment of an independent counsel as he did in the Iran/Contra matter, that appointment is in no sense compelled by the statute, but represents a voluntary decision by the Executive Branch to avail itself of the mechanism the statute provides to guarantee the independence and integrity of a specific criminal investigation as to which the Department of Justice may have a conflict of interest.[4] The availability of the *option* provided by § 591(c), and the fact that the Executive Branch *chose* to invoke that option in the Iran/Contra matter, render especially implausible the view that a core function of the Executive Branch is undermined unless all federal prosecutors are presidential appointees who serve at the pleasure of the President. That in turn strongly supports the constitutionality of the independent

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behalf. Such authorization appears to have been granted to independent counsel by 28 U.S.C. § 594(a)(2). This motion is nevertheless presented as a supplementary precaution.

[2] Citations are to the sections of the 1978 statute rather than to the statute as amended in 1987, except where noted.

[3] References to the Appendix to the Jurisdictional Statement will be styled in this manner.

[4] The Attorney General announced on December 2, 1986, that he was invoking § 591(c) "with the full encouragement and support of the President." The New York Times, Dec. 3, 1986, at A11, col. 1 (excerpts from statement of Attorney General Meese). *See* 22 Weekly Comp.Pres.Doc. 1613 (1986) (December 2, 1986 statement of President Reagan welcoming appointment of an independent counsel); *id.* at 1658 (December 19, 1986 statement of President Reagan promising Independent Counsel Walsh "complete cooperation" from "all members of my administration").

counsel statute, both in the setting of § 591(c) and in general.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. The Necessary and Proper Clause and the Appointments Clause Explicitly Empower Congress to Provide for Judicial Appointment of a Temporary Independent Counsel to Investigate Persons Whose Prosecution by the Attorney General May Entail a Conflict of Interest	2
A. The Necessary and Proper Clause Empowers Congress to Enact Conflict-of-Interest Laws That it Rationally Deems Would Facilitate the Faithful, Credible, and Impartial "Execution" of the Law Enforcement "Powers Vested By This Constitution" In The Executive Branch "or in Any Officer Thereof."	2
B. The Appointments Clause Expressly Authorizes Resort to Judicial Appointment	10
1. An independent counsel appointed at the request of the Attorney General and subject to removal for cause by the Attorney General is an "inferior officer" whose appointment Congress may "think proper" to "vest . . . in the Courts of Law."	10
2. Objections to the inter-branch character of an appointment do not render the Appointments Clause unavailable, but raise questions properly addressed solely in terms of whether any separation-of-powers prohibition is violated	15
II. The Independent Counsel Statute Is Not an Impermissible Aggrandizement of Congressional Power	17

TABLE OF CONTENTS—Continued

	Page
III. The Independent Counsel Statute Does Not Erode the Central Powers, or Compromise the Core Functions, of the Judicial or Executive Branches	19
A. The Responsibilities This Statute Assigns to the Judiciary Protect Its Integrity Without Calling Upon It to Perform Any Task Incompatible with Its Article III Role	19
B. Rather Than Eroding the Executive's Central Role in Law Enforcement, The Statutory Guarantee That a Judicially Appointed Independent Counsel May Be Removed by the Attorney General Only for Cause Facilitates the Executive's Ability To Discharge Its Investigative and Prosecutorial Duties Faithfully and Credibly	23
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	Page
Baker v. Carr, 369 U.S. 186 (1962)	12
Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51 (1825)	3
Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) (en banc) (per curiam)	13
Board of Governors v. Agnew, 329 U.S. 441 (1947)	5, 7
Bowsher v. Synar, 106 S.Ct. 3181 (1986)	*passim*
Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam)	10, 18, 30
Coleman v. Miller, 307 U.S. 433 (1939)	11
Collins v. United States, 14 Ct.Cl. 568 (1879)	10
Commodity Futures Trading Comm'n v. Schor, 106 S.Ct. 3245 (1986)	19
Edwards v. California, 314 U.S. 160 (1941)	14
Ex parte Curtis, 106 U.S. 371 (1882)	5
Ex parte Siebold, 100 U.S. 371 (1880)	11, 15, 16, 17
Federal Trade Commission v. Ruberoid Co., 343 U.S. 470 (1952)	26
Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)	16, 17, 25
Goldwater v. Carter, 444 U.S. 996 (1979)	8, 11
Grin v. Shine, 187 U.S. 181 (1902)	17
Humphrey's Executor v. United States, 295 U.S. 602 (1935)	25, 25, 26, 27, 28
In re Grand Jury Subpoena, 781 F.2d 238 (2d Cir.), *cert. denied*, 475 U.S. 1108 (1986)	20
In re Olson, 818 F.2d 34 (D.C. Cir., Div. for Purpose of Appointing Independent Counsels, 1987)	13
In re Sealed Case, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S.Ct. 753 (1988)	14
INS v. Chadha, 462 U.S. 919 (1983)	18
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	3
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	25, 27

TABLE OF AUTHORITIES—Continued

	Page
Marsh v. Chambers, 463 U.S. 783 (1983)	5
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)	3
Missouri v. Holland, 252 U.S. 416 (1920)	3
Myers v. United States, 272 U.S. 52 (1926)	4, 18, 23, 28, 30
Nixon v. Administrator of General Services, 433 U.S. 425 (1977)	19
Pennsylvania Bureau of Correction v. U.S. Marshals Service, 106 S. Ct. 355 (1985)	17
Powell v. McCormack, 395 U.S. 486 (1969)	11
Rice v. Ames, 180 U.S. 371 (1901)	17
Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (3-judge court) (per curiam), *aff'd*, *Bowsher v. Synar*, 106 S.Ct. 3181 (1986)	28
United States v. Allred, 155 U.S. 591 (1895)	16
United States v. Barnow, 239 U.S. 74 (1915)	4
United States v. Brown, 381 U.S. 437 (1965)	7
United States v. Germaine, 99 U.S. 508 (1879)	10
United States v. Lepowitch, 318 U.S. 702 (1943)	4
United States v. Nixon, 418 U.S. 683 (1974)	14, 20
United States v. Perkins, 116 U.S. 483 (1886)	22
Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825)	3
Wiener v. United States, 357 U.S. 349 (1958)	23, 25, 28
Young v. United States ex. rel. Vuitton et fils, 107 S. Ct. 2124 (1987)	4, 5, 7, 9, 20

UNITED STATES CONSTITUTION

Article I, Section 6, Clause 2	10
Section 8, Clause 18	*passim*
Article II, Section 1	10
Section 2, Clause 2	*passim*
Article III, Section 1	19
Section 2	21

TABLE OF AUTHORITIES—Continued

STATUTES, REGULATIONS AND RULES

	Page
5 U.S.C. §§ 701-06	23
15 U.S.C. § 45 *et seq.*	25
18 U.S.C. § 208a	5
18 U.S.C. § 912	4
28 U.S.C. § 526 (1925)	25
28 U.S.C. § 591 *et seq.*, Ethics in Government Act of 1978	
§ 591(b)	7, 13, 24
§ 591(c)	6, 7, 13, 20, 24
§ 592(b)(1)	13
§ 592(c)(1)	12
§ 592(d)(1)	13
§ 592(f)	13, 24
§ 593(b)	13, 21
§ 594(e)	22
§ 594(f)	8, 13
§ 596(a)(1)	9, 13, 23
§ 596(a)(3) (1987)	23
§ 596(b)	13, 22
28 C.F.R. §§ 600 & 601	14
Act of Feb. 28, 1871, ch. 99, § 8, 16 Stat. 436	15
Federal Rule of Criminal Procedure 44(c)	20
Ga Code Ann. § 24-2913	9
Independent Counsel Reauthorization Act of 1987, P.L. 100-191 (Dec. 15, 1987)	6
Idaho Code § 31-2603	9
Ill. Rev. Stat. ch. 14, § 6	9
Judiciary Act of September 24, 1789, ch. 20, § 29, 1 Stat. 73 (1789)	5, 16, 20
N.Y. County Law § 701	9

LEGISLATIVE MATERIALS

133 Cong. Rec. H8854, H8864 (daily ed. Oct. 21, 1987)	8, 9
133 Cong. Rec. S15623, S15631 (daily ed. Nov. 3, 1987)	7

TABLE OF AUTHORITIES—Continued

	Page
Final Report of the Senate Select Committee on Presidential Campaign Activities, 93d Cong., 2d Sess. (1974)	21
H. Rep. No. 1307, 95th Cong., 2d Sess. 2 (1978)	6, 9
S. Rep. No. 170, 95th Cong., 1st Sess. (1977)	4, 7, 22
S. Rep. No. 496, 97th Cong., 2d Sess. (1982)	26
S. Rep. No. 123, 100th Cong., 1st Sess. (1987)	9

OTHER AUTHORITIES

Special Prosecutor: Hearings Before the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. (1973)	6
Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum.L.Rev. 353 (1927)	27
H. Cummings & C. McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* (1937)	29
Developments in the Law—Conflicts of Interest in the Legal Profession, 94 Harv.L.Rev. 1244 (1981)	4
Documentary History of the First Federal Congress, 1789-1791, 5 *Legislative Histories* 1193 (1986) (Senate Bill 1)	16
English Bill of Rights, W. & M., Sess. 2, c. 2 (1689)	27
Ga. Const. of 1777, Art. XL	16
S. Johnson, *A Dictionary of the English Language* (1785)	14
N.C. Const. of 1776, Art. XIII	16
Reinstein, *An Early View of Executive Power and Privilege: The Trial of Smith and Ogden*, 2 Hastings Const. L.Q. 309 (1975)	27
S.C. Const. of 1778, Art. XXIX	16
J. Story, 3 *Commentaries on the Constitution* (1833)	11
The Federalist No. 44 (J. Madison)	3
The Federalist No. 76 (A. Hamilton)	6

TABLE OF AUTHORITIES—Continued

	Page
The Federalist No. 81 (A. Hamilton)	16
U.S. Attorneys Manual § 9-27.220 (June 15, 1987)	8
Va. Const. of 1776	16
L. White, *The Federalists: A Study in Administrative History* (1948)	28, 29

BRIEF AMICUS CURIAE OF LAWRENCE E. WALSH, INDEPENDENT COUNSEL

INTEREST OF AMICUS CURIAE

The interest of Independent Counsel Lawrence E. Walsh as *amicus curiae* is set forth in the preceding Motion for Leave to File.

SUMMARY OF ARGUMENT

When Congress legislated to empower the Executive Branch to undertake impartial investigation and prosecution of persons close to the President or the Attorney General, it acted not out of any extra-constitutional sense of practical necessity but out of a recognition that conflicts of interest could otherwise prevent the Executive Branch from carrying out its constitutional mission in a manner that would command the public confidence that mission requires. In doing so, Congress drew on two clear sources of power in the Constitution's text. *First*, the Necessary and Proper Clause of Article I empowers Congress to facilitate the faithful and credible execution of the law enforcement "Powers vested by this Constitution" in the Executive Branch "or in any . . . Officer thereof." See Part I-A. *Second*, the Appointments Clause of Article II expressly authorizes Congress to create an "inferior officer" charged with pursuing designated investigatory goals and, if Congress may "think proper," to place the appointment of that officer in the hands of the "Courts of Law." See Part I-B. The Necessary and Proper Clause read in conjunction with the Appointments Clause in turn authorizes Congress to secure the independence of that officer by forbidding her discharge without "good cause." See Part III.

The statute through which Congress has taken these steps comports fully with the separation-of-powers principles delineated by this Court: it neither works an impermissible aggrandizement of congressional power (see Part II) nor erodes the central powers, or compromises

the core functions, of the Judicial or Executive Branch. See Part III.

To endorse the novel course pioneered by the court below in striking the statute down is to embark upon an uncertain voyage partaking more of policy judgment than of principled adjudication, and imperiling the survival of the independent agencies. The Court should decline this invitation to replace Congress' considered judgments with its own on the subject of how best to avoid disabling conflicts of interest in the enforcement of federal law.

ARGUMENT

I. THE NECESSARY AND PROPER CLAUSE AND THE APPOINTMENTS CLAUSE EXPLICITLY EMPOWER CONGRESS TO PROVIDE FOR JUDICIAL APPOINTMENT OF A TEMPORARY INDEPENDENT COUNSEL TO INVESTIGATE PERSONS WHOSE PROSECUTION BY THE ATTORNEY GENERAL MAY ENTAIL A CONFLICT OF INTEREST.

A. The Necessary and Proper Clause Empowers Congress to Enact Conflict-of-Interest Laws That it Rationally Deems Would Facilitate the Faithful, Credible, and Impartial "Execution" of the Law Enforcement "Powers Vested By This Constitution" in The Executive Branch "or in Any . . . Officer Thereof."

The Necessary and Proper Clause provides explicit textual authority for Congress to enact an independent counsel statute that it rationally deems necessary to facilitate the credible operation of the Executive Branch, and a proper means, in particular, of freeing that branch from the taint and mire of disabling conflicts of interest.

Lost in most of the debate over the constitutionality of the independent counsel statute is the fact that the Necessary and Proper Clause is a source of congressional authority not simply to act pursuant to Congress' *own* enumerated powers, but also "to enact laws carrying into

execution the powers vested *in other departments* of the Federal Government," *Kaiser Aetna v. United States*, 444 U.S. 164, 172 n.7 (1979) (emphasis added).[1] For although the Constitution's ratification established the grand design for a tripartite national government and laid its foundation, it left much work to be done. Executive departments and lower federal courts were envisioned but not created. Questions of staffing, resources, organization, and the allocation of responsibilities within the executive and judicial arms remained to be decided.

Defending the independent counsel statute as necessary to free the Executive Branch from conflicting loyalties that would otherwise imperil visibly impartial prosecution does not, as the court below would have it, App. 60a, entail advancing an *extra*-constitutional argument from practical necessity. At issue, rather, is the manifest duty and province of Congress to structure the operations of the coordinate branches of government, making provision for such incidental powers as in *its* view will promote the "faithful execution"—that is, the steadfast and credible implementation—of the missions the Constitution entrusts to the Executive Branch. "[W]ithout the substance of this power, the whole Constitution would be a dead letter." *The Federalist* No. 44 (J. Madison) (em-

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[1] Art. I, § 8, cl. 18 grants Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*" (Emphasis added). Thus *Missouri v. Holland*, 252 U.S. 416, 432 (1920), for example, upheld a statute regulating commerce in migratory birds, at a time when the Commerce Clause was narrowly construed, as ancillary to the President's discharge of his power to conclude a treaty on that subject. And in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825), Chief Justice Marshall located the authority of the federal courts to promulgate procedural rules solely in an act of Congress, which in turn was authorized solely by the second half of the Necessary and Proper Clause. *See also Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 53-54 (1825). *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

phasis omitted). "Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose." *Myers v. United States*, 272 U.S. 52, 291-92 (1926) (Brandeis, J., dissenting).

That the Necessary and Proper Clause empowers Congress to create an office of independent counsel for cases in which the Attorney General has a conflict of interest follows from the universal recognition that prosecutorial conflicts of loyalty imperil not only good government in a political sense, but the faithful and credible discharge of the constitutional duties of the Executive Branch. It is a "basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest or the appearance thereof." S.Rep. No. 170, 95th Cong., 1st Sess. 6 (1977). Scrupulous adherence to this principle is particularly important for those attorneys who wield the power of government.[2] A federal prosecutor is "'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all,'" *Young v. United States ex rel. Vuitton et fils*, 107 S.Ct. 2124, 2135 (1987) (citation omitted).

Legislation to assure that federal prosecution will be spared the problems caused by a clash of loyalties fits comfortably within the tradition of laws passed by Congress as necessary and proper to protect the integrity and the credibility of Executive Branch operations. Thus Congress has enacted laws criminalizing impersonation of a federal officer with intent to defraud,[3] and the re-

[2] *See, e.g., Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv.L.Rev. 1244, 1415-18 (1981).

[3] 18 U.S.C. § 912. *See United States v. Lepowitch*, 318 U.S. 702, 704 (1943) (quoting *United States v. Barnow*, 239 U.S. 74, 80 (1915)) (grounding § 912 in Congress' power "to maintain the general good repute and dignity of the [government] service itself") (brackets in original).

ceipt by government officers of political contributions from government employees.[4] Such statutes shield the Executive Branch from both actual and apparent corruption. Myriad conflict-of-interest laws have likewise been enacted to promote the fact and appearance of impartial law enforcement.[5] And the Judiciary Act of 1789, anticipating the problem of occasional conflicts of interest on the part of U.S. Marshals appointed with the advice and consent of the Senate, empowered federal courts to "specially appoint" a "fit person" to undertake the Marshal's duties temporarily when "the Marshal or his Deputy is not an indifferent person or is interested in the event of the cause."[6]

A disabling conflict of interest is most acute when a prosecutor is required to investigate those executive officials from whom her appointment derives and at whose pleasure she serves, for then the clash of interests imperils not only professional standards of ethics and the principle of impartial government, but the Executive's duty to take care that the laws be faithfully executed. It is *this* power which Congress, pursuant to the Necessary and Proper Clause, has aided. For even if a new officer should be selected by the Executive Branch to conduct the necessary investigation of high-level executive officials, there would remain the danger that the primary qualification of the prosecutor the Executive chose would be—or *seem* to be—that of "being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render [the appointee] the

[4] *See Ex parte Curtis*, 106 U.S. 371 (1882).

[5] *See Board of Governors v. Agnew*, 329 U.S. 441 (1947); *Young v. Vuitton*, 107 S.Ct. at 2135 & n.13 (18 U.S.C. § 208(a)).

[6] Judiciary Act of September 24, 1789, ch. 20, § 29, 1 Stat. 73 (1789); *id.* at § 28. The constitutional judgments of the First Congress are entitled to substantial weight since so many members of that body had been involved in the drafting and ratification of the Constitution. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

obsequious instrument[] of [the President's] pleasure." *The Federalist* No. 76 (Hamilton).

Nor need one assume, as the majority below suggests, either a "personally corrupt President," App. 62a, or the personal venality of prosecutors charged with investigating possible wrongdoing by their associates in the Executive Branch. Congress concluded after years of study that, " 'as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is absolutely essential.' " H. Rep. No. 1307, 95th Cong., 2d Sess. 2 (1978) (quoting testimony of Prof. Cox). The problem addressed by the independent counsel statute is thus a fundamental, institutional conflict of interest that would otherwise undermine even the most incorruptible Executive's enforcement of the law. The majority below professed doubt that an Attorney General encounters a conflict of interest when asked to investigate his own deputies or the President's aides. App. 61a. But in the Iran Contra matter, Attorney General Meese himself displayed no such uncertainty: he "determine[d] that investigation . . . by [any] . . . officer of the Department of Justice may result in a . . . conflict of interest," § 591(c), and therefore *voluntarily* called for Independent Counsel Walsh's appointment pursuant to § 591(c).

It is often forgotten that such conflicts of interest may cut both ways. Conflicting loyalties may just as easily induce excessive prosecutorial zeal as undue sloth: "[i]t is just as bad for a man of honor to lean over backwards to avoid the imputation of bias as it is to be actually biased," *Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 372 (1973) (testimony of Prof. Freund).[7] A prosecutor charged

[7] Senator Levin, co-sponsor and floor manager of the Independent Counsel Reauthorization Act of 1987, P.L. 100-191 (Dec. 15, 1987), observed that "prosecutors facing such public skepticism may actually treat persons close to the President even more harshly than other criminal suspects just to escape any appearance of bias." 133 Cong. Rec. S15623 (daily ed. Nov. 3, 1987).

with investigating those for whom she works and those close to her superiors is thus poised between Scylla and Charybdis: the impulse to please those who hire and fire her may lead to a white-wash; the drive to demonstrate fearless impartiality may end in a witch-hunt. Moreover, the appearance of a conflict of interest is as damaging to public confidence in law enforcement, and in the administration of justice, as actual conflict itself. S. Rep. No. 170, 95th Cong., 1st Sess. 6 (1977); *Young v. Vuitton*, 107 S.Ct. at 2136-37.

Section 591(c) of Title 28 accordingly empowers the Attorney General to "apply for an independent counsel . . . if the Attorney General determines that investigation" of a particular individual "by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest."[8] Congress reasonably concluded that the public would have confidence in the impartiality of investigatory and prosecutorial decisions made by such an independent counsel, whereas the same decision made by an Attorney General who recognized that he had a conflict of interest, or the appearance thereof, would breed public distrust. S.Rep. No. 170, 95th Cong., 1st Sess. 7

[8] 28 U.S.C. § 591(c). Section 591(b) contains a list of high executive officials whose prosecution by the Attorney General or the Department of Justice beyond the preliminary investigation stage is conclusively presumed to create at least the appearance of a conflict of interest. This provision, like § 591(c), casts no aspersions on the integrity of any particular individual or office. In enacting § 591, Congress did as it has done in prior conflict-of-interest statutes, and "relied upon its general knowledge of human psychology," *United States v. Brown*, 381 U.S. 437, 454 (1965), in concluding that investigation of people in those named positions by *anyone* in the Department of Justice would raise the specter of a conflict of interest. The use of such conclusive presumptions in conflict-of-interest statutes has been approved by this Court. *See Board of Governors v. Agnew*, 329 U.S. 441 (1947); *United States v. Brown*, 381 U.S. at 453-54.

(1977).[9] Thus the concern of the court below that an independent counsel may be insufficiently sensitive to the policy considerations, foreign and otherwise, that would *properly* restrain an ordinary prosecutor is ironically misplaced:[10] it is precisely the independent counsel's

[9] This conclusion has been borne out: "[Independent counsels'] decisions [not to file criminal charges] have been accepted as fair and objective, and the vindication that targets . . . have rightfully claimed has not been tainted by allegations that the vindication was the result of a 'fix.'" 133 Cong. Rec. H8864-65 (daily ed. Oct. 21, 1987) (statement of Rep. Hughes).

[10] The majority below expressed particular fear that an independent counsel's decisions might conflict with the policies of the Executive Branch in "matters affecting international relations," App. 57a. But, as the dissent below correctly noted, "no . . . conflict with foreign policy has been identified in the present case, and there is no reason to suppose that problems that might arise cannot be handled by district court control on a case-by-case basis." App. 107a n.22. Independent Counsel Walsh, for example, has consulted with the State Department and other divisions of the Executive Branch with respect to foreign policy, national security, and other sensitive matters, consistent with the normal Department of Justice policy that the independent counsel statute binds independent counsels to follow "except where not possible." § 594(f). Just as federal judicial intervention into a hypothetical executive-legislative clash should await a ripe occasion for such intervention, *see Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring in the judgment), so the majority below erred in escalating a statement plucked from an oral argument on behalf of Independent Counsel Walsh in another case, App. 58a, into a basis for invalidating the independent counsel statute.

Similarly, the majority erred in extracting, from a preliminary text of remarks by Independent Counsel Walsh, App. 72a, a supposed inclination to prosecute whenever probable cause is established. As delivered, the speech by Mr. Walsh expressed no such inclination but, rather, stated the policy of this office in terms fully consistent with Justice Department Guidelines, *see* U.S. Attorneys' Manual § 9-27.220 (June 15, 1987). In any event, the history of practice under the statute amply demonstrates extraordinary restraint by those appointed to the office of independent counsel. Four of the seven publicly appointed independent counsels have found insufficient basis for prosecution, and every indictment sought by the remaining counsels has resulted in a conviction.

freedom from suspected favoritism that liberates her to give appropriate weight to these considerations.[11]

By removing the need to expunge any apparent taint, the use of a statutorily independent prosecutor thus enhances the credibility and integrity of federal law enforcement and simultaneously "serves to help protect the good name and reputation of innocent persons wrongly accused of crime." H.Rep. No. 1307, 95th Cong., 2d Sess. 2 (1978).[12]

Although the court below opined that the "conflict of interest" that Congress sought to combat in the Ethics in Government Act "is found in the Constitution itself," App. 65a, the Constitution, far from making such conflicts unavoidable short of impeachment or revolution,

[11] Whether an independent counsel's failure to do so could constitute "good cause" for discharge by the Attorney General under § 596(a)(1) is a patently unripe question that may never arise.

[12] Far from "weaken[ing] constitutional structures that serve to protect individual liberty," App. 10a, the independent counsel provisions invigorate them by removing an institutional conflict of interest. As this Court explained in *Young v. Vuitton*, the possibility that "prosecutors may on occasion be overzealous and become overly committed to obtaining a conviction. . . . 'does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration.'" 107 S.Ct. at 2138 n.18 (citation omitted).

When Congress reauthorized the independent counsel law in 1987, its review of investigations pursuant to the law revealed none of the abuses or vices which the majority below imagines. *See* S. Rep. No. 123, 100th Cong., 1st Sess. 8. "Clearly, the act has not generated runaway, overzealous prosecutors conducting star chamber proceedings." 133 Cong. Rec. H8864 (daily ed. Oct. 21, 1987) (statement of Rep. Hughes).

In any event, on the premise of the majority below that the "very independence" of an independent counsel denies fundamental fairness to those under investigation, App. 70a, there would be a fatal due process objection to the numerous state statutes providing for judicial appointment of temporary special prosecutors. *See, e.g.*, Ill. Rev. Stat. ch. 14, § 6; Idaho Code § 31-2602; Ga. Code Ann. § 24-2913; N.Y. County Law § 701.

not only avoids some disabling conflicts of interest from the outset (as in Art. I, § 6, cl. 2; Art. II, § 1, cl. 2), but also, in the Necessary and Proper Clause, endows Congress with the capacity to alleviate other conflicts as the need arises.

B. The Appointments Clause Expressly Authorizes Resort to Judicial Appointment.

1. *An independent counsel appointed at the request of the Attorney General and subject to removal for cause by the Attorney General is an "inferior officer" whose appointment Congress may "think proper" to "vest . . . in the Courts of Law."*

Even apart from the Necessary and Proper Clause, the Constitution contains the most explicit imaginable textual authority for the allocation of appointment power wrought by the independent counsel statute: "Congress may by Law vest the Appointment of such inferior officers, as they think proper, . . . in the Courts of Law . . . ." Art. II, § 2, cl.2. "The Constitution for purposes of appointment very clearly divide[d] all its officers into two classes." *United States v. Germaine*, 99 U.S. 508, 509 (1879). Under the standard delineated in *Germaine*, and reaffirmed in *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (per curiam), "inferior officers" are "officers inferior to those specially mentioned." *Id.* (quoting *Germaine*, 99 U.S. at 510). Those "specially mentioned" in the Appointments Clause are principal officers: "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court," and, of course, "those officers in whom respectively the power of appointment may be vested—the President, the courts of law, and the heads of departments." *Collins v. United States*, 14 Ct.Cl. 568, 574 (1879).[13] Since the independent counsel does not fall into any of these categories, she is an "inferior officer."

[13] Much of the opinion below is devoted to attacking a parade of straw men—fashioned on the premise that department heads and lower court judges are inferior officers—such as the possibility of Congress vesting the appointment of all federal district court judges in the Attorney General. App. 13a, 38a-41a & n.32. Once it is recognized that such judges and cabinet secretaries are "specially mentioned" in the Appointments Clause and therefore not "inferior officers," these straw men scatter with the wind.

Moreover, the Constitution expressly grants to Congress the discretion to select "as they think proper" among the enumerated modes of appointment of inferior officers. Art. II, § 2. The court below maintains that there is "no authority" for reading this language to mean what it says. App. 23a n.20. But even if the Appointments Clause, despite its plain terms, did not constitute a "textually demonstrable constitutional commitment," *Powell v. McCormack*, 395 U.S. 486, 518 (1969), to Congress of the power to determine how officers other than those "specially mentioned" are to be appointed, it is certain that the clause, while listing the methods of appointment among which Congress may choose, provides no guidance whatever for judging whether Congress has made the wrong choice. *Cf. Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., joined by Burger, C.J., and Stewart and Stevens, JJ.) (Constitution's silence on "the manner in which" a branch is to participate in a governmental action renders dispute nonjusticiably political); *Coleman v. Miller*, 307 U.S. 433, 450 (1939).

In any event, this Court provided all the authority anyone might require when it construed Art. II, § 2 to declare that "the selection of the appointing power, as between the functionaries named, *is a matter resting in the discretion of Congress.*" *Ex parte Siebold*, 100 U.S. 371, 397-98 (1879) (emphasis added). Justice Story long before explained that the wisdom of reposing this choice in Congress' discretion "cannot well be questioned. . . . It is difficult to foresee, or to provide for all the combinations of circumstances, which might vary the right to appoint in such cases." J. Story, 3 *Commentaries on the Constitution* § 1529 (1833).

The court below abandoned the bright line drawn in Art. II, § 2 between "specially mentioned" and "inferior" officers, preferring to pioneer a fuzzy "functional" test for determining whether an officer is inferior enough. App. 17a, 21a-23a. Whether an independent counsel is an inferior or a principal officer, it seems, turns on such factors as whether the independent counsel "has served for . . . as long as many cabinet officers," App. 22a, how many independent counsels "have been appointed under the statute" and are "in operation at the present," App. 23a, and even how many employees the counsel supervises. *Id.* Still more alarming is the court of appeals' repeated reference to what it perceives as the essentially partisan, political origins of both the independent counsel statute and the occasions of its use. App. 4a-5a, 62a-64a, 67a. It would be hard to imagine better examples of "criteria of decision that necessary escap[e] the judicial grasp," *Baker v. Carr*, 369 U.S. 186, 214 (1962). But even if the court of appeals' amorphous test were deemed to involve no political question, that court's approach nonetheless demonstrates the wisdom of the Framers in expressly providing for the appointment of inferior officers at Congress' discretion.

Although the court of appeals stops short of arguing that independent counsels "are themselves 'heads of departments,'" App. 23a, it insists that, whatever the independent counsel may be, she is too autonomous and august to be deemed an inferior officer. Even if one could accept the court's vague notion that the "depth," "breadth," and "magnitude of the [officer's] task . . . is constitutionally determinative," App. 23a, the independent counsel easily qualifies as "inferior." An independent counsel is appointed only at the request of the Attorney General. No such appointment can be sought unless and until the Attorney General, having completed his own preliminary investigation, § 592(c)(1), determines either that there is reason to investigate a possible federal crime by one of the senior executive officials listed in § 591(b), or—as in the case of Independent Counsel Walsh—that criminal investigation of a matter by the Attorney General or his subordinates might, in the Attorney General's own opinion, result in a conflict of interest. § 591(c). A decision by the Attorney General whether to ask for appointment of an independent counsel is final and unreviewable. § 592(b)(1) & (f); *Banzhaf v. Smith*, 737 F.2d 1167, 1169-70 (D.C. Cir. 1984) (en banc) (per curiam).

Once appointed, the independent counsel's jurisdiction is restricted to a specific investigation of a particular set of acts and individuals. That limited, temporary, § 596(b), jurisdiction is defined by the appointing court, § 593(b), in reliance on the Attorney General's own application. § 592(d)(1). The court may not freely expand the jurisdiction of an existing independent counsel to include matters which the Attorney General has previously determined should not be pursued. *In re Olson*, 818 F.2d 34, 47-48 (D.C. Cir., Spec. Div., 1987) (per curiam). The independent counsel must comply with the established investigative and prosecutorial policies of the Justice Department "except where not possible." § 594(f). Most importantly, the Attorney General retains the power to remove the independent counsel for good cause. § 596(a)(1). To say that, despite this removal power, the independent counsel may not be deemed an officer "inferior" to the Attorney General flies in the face of this Court's explicit conclusion in *Bowsher v. Synar*, 106 S.Ct. at 3191, that the Comptroller General's removability for cause by joint resolution of the House and Senate renders that officer "subservient to Congress." [14]

[14] This also disposes of the argument—really more of a play on words—that the independent counsel cannot be an "inferior" officer unless she is "subordinate to a principal officer." App. 17a. This Court has never held that an inferior officer must be removable at will by some superior. In any event, the court below relies far too much on the term "inferior." At the time the Constitution was written, the primary meaning of "inferior" was lower in place,

Finally, both *United States v. Nixon*, 418 U.S. 683 (1974), which approved the Attorney General's appointment of the Watergate Special Prosecutor, and *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S.Ct. 753 (1988), which upheld Independent Counsel Walsh's parallel appointment by the Attorney General, confirm that a person possessing all the powers and duties of a statutory independent counsel can be named by a head of department without Senate confirmation, and therefore *must* be an inferior officer. In each case, the regulations promulgated by the Attorney General committed the Executive Branch to preserving the independence of the special prosecutor. *United States v. Nixon*, 418 U.S. at 696; 28 C.F.R. §§ 600.1 & 600.3 (1987). The only answer by the court below to this argument, App. 18a-19a n.17, is that such an independent counsel is "inferior" only because the Attorney General's power to revoke "at any time" the regulation creating that counsel's office renders the officer's independence illusory and makes the Attorney General's promise not to discharge or interfere with such a counsel "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring). This argument manifests an unwarranted distrust of the Executive. It cannot be that the Executive Branch complied with Article II in these cases by making a promise with its fingers crossed—that a mental reservation can somehow make an otherwise unconstitutional arrangement comport with the separation of powers.

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rank, or station. "Subordinate"—the meaning used by the court of appeals, App. 16a-18a—was the least common usage of "inferior." S. Johnson, *A Dictionary of the English Language* (1785).

2. Objections to the inter-branch character of an appointment do not render the Appointments Clause unavailable, but raise questions properly addressed solely in terms of whether any separation-of-powers prohibition is violated.

The opinion below concedes that the language of the Appointments Clause permits inter-branch appointments, App. 30a, but the majority of the panel was offended by the prospect that a principal officer of one branch of government might be empowered to appoint an inferior officer of another. App. 29a-42a. Lines of appointment power on the federal organizational chart, it would seem, must be vertical within each branch; diagonals are not permitted. But the Appointments Clause does not enact the principles of Euclid or the preferences of Mondrian. However aesthetically appealing it might be for Congress to vest the appointment of inferior officers only in the branch or department "to which the duties of such officers appertain . . . *there is no absolute requirement to this effect in the Constitution . . . .*" *Ex parte Siebold*, 100 U.S. at 397 (emphasis added).

The court below struggled to evade *Siebold's* endorsement of inter-branch appointments by arguing that the judicially appointed election supervisors whose authority was upheld in that case did not perform typical executive functions. App. 36a-38a. Yet it was alleged in *Siebold*, and the Court assumed for the sake of argument, that the supervisors' duties were "entirely executive in their character." 100 U.S. at 397. Those duties included the power to "prevent fraudulent registration and fraudulent voting," "to keep the peace, to "preserve order," and to "arrest and take into custody, with or without process, any person . . . who shall commit any offense against the laws of the United States." Act of Feb. 28, 1871, ch. 99, § 8, 16 Stat. 436.[15]

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[15] A review of the relevant history and documents reveals that the Framers saw nothing inappropriate in inter-branch appointments in general. Several of the state constitutions that were praised by

Having brushed aside the holding in *Siebold*, the court below seizes on dictum in that case to fashion a sweeping "incongruity" test for inter-branch appointments: "it must be incongruous if an officer of one branch is authorized to appoint an officer of another branch who is assigned a duty central to the constitutional role of that other branch." App. 38a. *Compare Siebold*, 100 U.S. at 398. Since the court of appeals assumed enforcement of the criminal law to be an exclusive and cardinal executive function, App. 29a, 42a—a dubious assumption in historical terms—its incongruency analysis would dictate the opposite result in *Siebold*. Application of this standard would likewise overturn those cases where this Court has upheld judicial appointment of inferior officers " 'learned in the law' " who are charged with arresting, imprisoning, and prosecuting those who criminally coerce voters, *United States v. Allred*, 155 U.S. 591, 594 (1895) (citation omitted); or "institut[ing] prosecutions under laws relating to the elective franchise and civil rights," *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 353 n.2 (1931) (United States commissioners); or en-

The Federalist Papers as models for the judicial structure chosen by the Framers, *see The Federalist* No. 81 (Hamilton), provided that the state's supreme court, *see* Ga. Const. of 1777, Art. XI, or legislature should appoint the state's attorney general, *see* Va. Const. of 1776; S.C. Const. of 1778, Art. XXIX; N.C. Const. of 1776, Art. XIII. Members of the First Congress considered vesting the power to appoint federal prosecutors in the district courts. *Documentary History of the First Federal Congress, 1789-1791*, 5 *Legislative Histories* 1193-94 (C. Bickford & H. Veit, eds., 1986) (Senate Bill 1). As the dissenting opinion below points out, App. 35a n.41, the argument that this mode of appointment was rejected as unconstitutional is entirely speculative. In any event, that same Congress provided, as part of the Judiciary Act of 1789, for the special appointment by the courts of temporary U.S. Marshals—law enforcement officers within the executive branch, *Siebold*, 100 U.S. at 397; *Pennsylvania Bureau of Correction v. United States Marshals Service*, 106 S.Ct. 355, 358 n.1, 359 (1985)—when the regularly appointed Marshal could not fulfil his duties due to a conflict of interest. See text accompanying note 6, *supra*.

forcing extradition treaties with foreign governments, *Rice v. Ames*, 180 U.S. 371, 377-78 (1901).[16]

The "incongruity" test as articulated by the court of appeals provides little guidance. *Siebold* itself refused to place much emphasis on labels like "executive" and "judicial" when dealing with inferior officers, because of its recognition that "it would be difficult in many cases to determine to which [branch] an office properly belonged." 100 U.S. at 397.[17] By interjecting its incongruency analysis into the Appointments Clause, the court of appeals thus once again offers a wholly indeterminate subjective test. An impressionistic conclusion that the "Act considered as a whole thus strikes us" as unconstitutional, App. 60a, cannot suffice to sustain the judgment below. We suggest a return to this Court's extensively delineated separation-of-powers analysis: an inter-branch appointment should be deemed an unconstitutional "incongruity" only if it permits congressional self-aggrandizement, see Part II, *infra*; deforms a coordinate branch, see Part III-A, *infra*; or threatens the core functions of a coordinate branch, see Part III-B, *infra*.

II. THE INDEPENDENT COUNSEL STATUTE IS NOT AN IMPERMISSIBLE AGGRANDIZEMENT OF CONGRESSIONAL POWER.

The court below concedes that the Framers' central separation-of-powers concern was "that the "Legislative

[16] The force of these precedents cannot be deflected by pointing out that U.S. Commissioners have often been described not as executive officials but as "officer[s] of the district court," *Go-Bart*, 282 U.S. at 354, or as "adjunct[s] of the court," *Grin v. Shine*, 187 U.S. 181, 187 (1902), any more than it advances the position of the court below to label the election supervisors in *Siebold* as legislative officers. App. 36a. No matter what label one chooses, the conclusion is inescapable that Congress' power to repose appointment of prosecutors and law enforcement officials in the courts has been consistently upheld for over a century.

[17] The *Siebold* Court noted that a marshal, although "an executive officer," is also "pre-eminently the officer of the courts," 100 U.S. at 397. The same is true of all prosecutors. See Part III-A, *infra*.

Branch . . . will aggrandize itself at the expense of the other branches." App. 66a (quoting *Bowsher v. Synar*, 106 S.Ct. 3181, 3189 (1986)). It is this very concern that plainly animates the modern renaissance of separation of powers doctrine. This Court has turned back attempts by Congress to concentrate executive power in itself by usurping the authority to appoint executive officers, *see Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam); to remove them, *see Bowsher v. Synar*, 106 S.Ct. at 3188; *Myers v. United States*, 272 U.S. 52, 161 (1926); or to retain a veto over how they execute the law, *see Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

In apparent recognition of the fact that congressional self-agrandizement underlay each of this Court's recent separation-of-powers decisions, the court below strains to see legislative overreaching where none exists. Congress has given itself no role at all in appointing, removing, or supervising an independent counsel.[18] The majority is reduced to observing that, even though "Congress' role under the Act is limited to a non-binding call for the appointment of an independent counsel and the right to receive reports from that office," App. 66a, the Act nevertheless "alters the political equation" because "repeated calls for the appointment of a statutory independent counsel may, like a flicking left jab, confound the Executive Branch," App. 67a. But Congress' role under the Act is surely more passive than pugilistic—and, in any event, the Presidency does not have the institutional glass jaw the majority below imagines. The separation of powers is no more threatened when Congress suggests an independent investigation of high executive officials than when Congress questions or criticizes those officials in its hearing rooms.

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[18] The Act's reporting and oversight requirements are clearly constitutional. *See INS v. Chadha*, 462 U.S. at 955 n.19 (imposition of "formal reporting requirements" on administrative agencies "lie[s] well within Congress' constitutional power").

Perhaps sensing how feeble this showing of supposed legislative aggrandizement truly is, the court below paints the separation of powers as some sort of zero-sum game: "whether or not Congress can actually exercise subtle influence over" an independent counsel, "Congress' political power must necessarily increase vis-a-vis the President," App. 67a, since the Executive Branch does not select the independent counsel—even though it retains the power to remove her for cause or not to seek her appointment in the first place. That is a conclusion, not an argument. In fact, by reposing authority to appoint independent counsels in the courts—thereby foregoing the Senate's opportunity to provide "advice and consent"—Congress has acted to diminish, rather than augment, its own powers.

Where, as here, a case "raises no question of the aggrandizement of congressional power at the expense of a coordinate branch," *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245, 3261 (1986), "the proper inquiry focuses on the extent to which [the challenged law] prevents the [coordinate] branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). *See also Schor*, 106 S.Ct. at 3258; App. 103a-04a (dissenting opinion).

III. THE INDEPENDENT COUNSEL STATUTE DOES NOT ERODE THE CENTRAL POWERS, OR COMPROMISE THE CORE FUNCTIONS, OF THE JUDICIAL OR EXECUTIVE BRANCH.

A. The Responsibilities This Statute Assigns to the Judiciary Protect Its Integrity Without Calling Upon It to Perform Any Task Incompatible with Its Article III Role.

The expansive grant of "[t]he judicial Power" in Article III, § 1, has always been understood to encompass inherent judicial authority to preserve the integrity of

the judicial process by policing the officers of the court, be they prosecutors or defense attorneys, for conflicts of interest.[19] Congressional enactments under the Necessary and Proper Clause to effectuate this judicial power to prevent or remedy conflicts of interest on the part of officers of the court began with the First Congress.[20]

By empowering the Attorney General to request the judicial appointment of an independent counsel in cases of conflict, § 591(c) merely adds to these safeguards a prophylactic measure that minimizes the need for later judicial intrusion into the prosecutorial function by removing at the outset actual or apparent taints on its exercise. At the same time, § 591(c) reduces the risk that the Article III courts' role in adjudicating genuinely adversary "cases" or "controversies" will be subverted by feigned or collusive prosecutions of presidential aides or allies by friendly executive attorneys. Instructive in this regard is this Court's conclusion, in *United States v. Nixon*, 418 U.S. 683 (1974), that it would "gravely impair the role of the courts under Art. III . . . . if judgments were to be founded on a partial or speculative presentation of the facts," *id.* at 707, 709. If "[t]he very integrity of the judicial system and public confidence in the system," *id.* at 709, depend on assurance that the

[19] *See Young v. Vuitton*, 107 S.Ct. at 2135-36 (courts have supervisory power to prohibit appointment of interested counsel to prosecute a contempt citation); *In re Grand Jury Subpoena*, 781 F.2d 238, 251 (2d Cir. 1985) ("courts have the power and the duty to disqualify defense counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused's constitutional right"), *cert. denied*, 475 U.S. 1108 (1986).

[20] The Judiciary Act of 1789 empowered the federal judiciary to "specially appoint" a temporary U.S. Marshal when the presidentially appointed Marshal had a conflict of interest in a particular case. See text accompanying note 6, *supra*. More recently, Congress approved Federal Rule of Criminal Procedure 44(c), which requires district courts to inquire into all instances of multiple representation of criminal defendants and to "take such measures as may be appropriate" unless "it appears that there is good cause to believe no conflict of interest is likely to arise."

prosecution is neither pulling its punches to protect its friends nor hounding a hapless public servant to preserve its image, it follows that legislation to protect the Article III courts from being transformed into stages for such displays, far from distorting the constitutional function of those courts, in fact shields that function from the perversions that attend conflicts of interest.[21]

The argument that the specific powers conferred on the courts by the independent counsel statute are nonetheless incompatible with Article III insofar as they require the performance of tasks other than the resolution of "cases" or "controversies" misreads Article III, § 2. The enumeration of "cases" and "controversies" to which "[t]he judicial Power shall extend" merely recites the nature of the *disputes* that Article III courts may resolve. Plainly, the express terms of the Appointments Clause refute the suggestion that for any power to be properly exercised by an Article III court it must first be found to entail resolution of "cases" or "controversies." For the Appointments Clause expressly authorizes Congress to vest "in the Courts of Law" the power to appoint inferior officers —a power that *necessarily* entails actions outside "the context of a case or controversy." App. 79a. Read in conjunction with the Appointments Clause, the Necessary and Proper Clause manifestly permits Congress to give the federal courts those incidental powers that are appropriate to effectuating the purposes served by such an appointment—including the power to "define [the] independent counsel's prosecutorial jurisdiction," § 593(b).

Indeed, the tasks assigned to the Special Division under the Act are paradigmatic examples of powers "Neces-

[21] During the Watergate affair the Assistant Attorney General who was ostensibly in charge of the investigation discussed the matter with presidential aides and "served as a conduit for a constant flow of information from the grand jury and the prosecutors first to [John] Dean and then to the President." *Final Report of the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong., 2d Sess. 80 (1974).

sary and Proper" to make meaningful Congress' Article II authority to vest appointment power in the federal courts. Without the ability to review petitions concerning the independent counsel's jurisdiction, § 594(e), the appointment power could be undermined either by an independent counsel too timid to act as needed or by one insensitive to the boundaries of the jurisdiction conferred in that counsel's appointment.[22] The requirement that the Attorney General possess good cause for removal prevents the vesting of power in the Special Division from becoming a dead letter, with any appointment voidable at the whim of the Executive from the moment it is made. *Cf. United States v. Perkins*, 116 U.S. 483, 485 (1886). The provision for termination of the office by the Special Division once its purposes have been fully discharged, § 596(b)(2), is an appropriate housekeeping measure ensuring an orderly end to an inherently temporary appointment.[23] And, contrary to the thrust of the opinion below, App. 85a, the Act surely does not call upon the Special Division to act as both judge and prosecutor. For any

[22] The majority below notes that in the Iran/Contra investigation the Special Division defined Independent Counsel Walsh's jurisdiction to include more subjects than were mentioned in the Attorney General's application. App. 78a. The majority's intimations of partisan political motivation, App. 78a-79a, are made without record support and should be dismissed as speculation that adds nothing to the constitutional analysis.

[23] The suggestion by the court below that the power of the Special Division to terminate the office when its business is done somehow enables that body "to control the pace and depth of the independent counsel's activities," App. 82a, is altogether implausible. Congress carefully distinguished between the Attorney General's removal power, which turns on the "conduct of the [independent counsel]," and the Special Division's formal termination duty, which turns on the "state of the investigation." S.Rep. No. 170, 95th Cong., 1st Sess. 75 (1977). Any supposed incompatibility between the judicial function and the task of formally concluding an investigation poses no currently ripe controversy. *Cf. Bowsher v. Synar*, 106 S. Ct. 3181, 3211-14 (1986) (White, J., dissenting); *id.* at 3215 (Blackmun, J., dissenting).

prosecutions the independent counsel may bring would not be heard before the judges who appointed her, nor would the Special Division hear an appeal from any action she may bring challenging her dismissal.[24]

B. Rather Than Eroding the Executive's Central Role in Law Enforcement, The Statutory Guarantee That a Judicially Appointed Independent Counsel May Be Removed by the Attorney General Only For Cause Facilitates the Executive's Ability to Discharge Its Investigative and Prosecutorial Duties Faithfully and Credibly.

By permitting the Attorney General to remove an independent counsel only for "good cause," § 596(a)(1), the independent counsel statute enables the counsel to exercise independent prosecutorial judgment, uncompromised by conflicting loyalties or fears of reprisal, and untainted by any public doubt as to the impartiality of that judgment. A regulation that, as the court below sees it, can be modified or revoked "at any time," App. 18a, does not solve either the conflicts problem or its public perception.

The independent counsel statute gives the President and the Attorney General a way to tie their hands without leaving them the option of wriggling free by repealing the regulation and summarily dismissing the independent counsel. If Odysseus can always free himself

[24] Congress' 1987 amendments to the Act provide that removal may be reviewed by the district court. 28 U.S.C. § 596(a)(3) (as amended Dec. 15, 1987). This is unexceptional: the allegedly unlawful dismissal of a federal officer may routinely be reviewed in federal court pursuant to the Administrative Procedure Act, 5 U.S.C. § 701-06. *See also Myers*, *Wiener* and *Humphrey's Executor*, discussed *infra*. Since the Special Division's power to review the independent counsel's removal by the Attorney General has been repealed, challenges to that feature of the Act—which cannot be shown to have affected any power ever exercised by any independent counsel—are obviously moot. To say this view "sales directly into the *Bowsher* wind," App. 43a-44a n.36, is to read *Bowsher* as overriding the case-or-controversy requirement of Article III.

from the mast, the song of the Sirens remains an unavoidable distraction. By empowering the Attorney General to obtain the services of an independent counsel whenever *he* judges that further investigation by the Department of Justice would entail a conflict of interest, § 591(c) performs for the Executive Branch the service Odysseus was done, at his request, when his sailors bound him to the mast as their ship approached the Siren's rocks.[25] This freedom to bind oneself in order to accomplish one's goal—the truly faithful and uncompromised execution of the law—no more invades the autonomy of the Executive than the law of contract invades the autonomy of the individual. Because the Attorney General retains the unreviewable power to decide *not* to trigger appointment of an independent counsel, this statutory contract is an offer the Executive Branch is always free to refuse.

The majority below saw the matter differently, concluding that criminal prosecution is so quintessentially an executive function that it may constitutionally be performed only by officers under the President's direct supervision and subject to dismissal without cause. App. 42a-43a. A parallel argument about inalienable executive functions was tendered by the Solicitor General in *Bowsher v. Synar* and rejected by the Court. 106 S.Ct. at 3188-89 & n.4; *id.* at 3206 (White, J., dissenting). No member of this Court there disagreed with the "long-standing recognition that it is within the power of Congress under the 'Necessary and Proper' Clause, Art. I, § 8, to vest authority that falls within the Court's definition of executive power in officers who are not subject to removal at will by the President and are therefore not under the President's direct control." *Id.* at 3206 (White,

[25] Section 591(b) achieves the same result by conclusively presuming that investigation of certain executive officials entails a conflict of interest. The Attorney General's determination that no investigation is warranted by the evidence is, of course, the final word. § 592(f).

J., dissenting). This Court's cases have distinguished between those officers whose functions make them the Executive's own subordinates and "those whose tasks require absolute freedom from Executive interference." *Wiener v. United States*, 357 U.S. 349, 353 (1958). *See also Humphrey's Executor v. United States*, 295 U.S. 602, 625-26, 628 (1935).[26]

The majority below tries to confine the rule of *Humphrey's Executor* to officials with "quasi-legislative or quasi-judicial powers," declaring that the rule has no application to "purely executive officers" such as an independent counsel charged with going to court to enforce the law. App. 45a-46a. But the Federal Trade Commissioners whose independent tenure was upheld in that case were similarly charged with investigating antitrust violations, filing complaints stating the charges, and going to court to enforce cease-and-desist orders. *Humphrey's Executor*, 295 U.S. at 620-21; Federal Trade Commission Act, ch. 311, 15 U.S.C. §§ 45, 46, 49, 50, 38 Stat. 717 §§ 5, 6, 9, 10. *See also Bowsher*, 106 S.Ct. at 3207 n.3 (White, J., dissenting).[27] Like the independent counsel here, the Commissioners were obliged to "act with entire impartiality" and "charged with the enforcement of no policy except the policy of the law." *Humphrey's Executor*, 295 U.S. at 624.

[26] In *Humphrey's Executor*, the Court traced this "sharp line of cleavage," *Wiener*, 357 U.S. at 353, to the distinction made in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803), between "heads of departments [who] are the political and confidential agents of the executive, merely to execute the will of the President," and officers to whom "a specific duty is assigned by law, and [where] individual rights depend upon the performance of that duty." The latter, the Court held, are "officer[s] of the law." *Id. See Humphrey's Executor*, 295 U.S. at 631.

[27] The United States Commissioners whose authority was sustained in *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931), were likewise charged with "institut[ing] prosecutions under laws relating to the elective franchise and civil rights," *id.* at 353 n.2, and were "subject to removal by the court appointing them." *Id.* at 353 (citing 28 U.S.C. § 526 (1925)).

Perhaps sensing the futility of this effort to escape *Humphrey's Executor*, the majority below strives to distinguish the Federal Trade Commissioners from an independent counsel on the ground that the former may be given law enforcement duties only because they play a significant role in defining the substantive content of the statutes they enforce, whereas the independent counsel has no role in giving shape to pre-existing federal criminal law. App. 49a-50a. But surely, if a measure of independence from executive control is the alleged constitutional vice—which supposedly threatens the rights of criminal suspects—it could not solve the problem to give an independent law enforcement officer the additional power to define and clarify the offenses to be prosecuted. Whatever one thinks of Justice Jackson's colorful conclusion that independent agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking," *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (dissenting opinion), it is hard to credit the suggestion that the independent counsel statute runs afoul of the separation of powers because it is structured to *minimize* such "derangement."

Since it cannot be reconciled with *Humphrey's Executor*, the decision below threatens the constitutional viability of the FTC, the Federal Reserve Board, and the other independent agencies whose duties include not only enforcing the law in the courts but also making and "executing" federal policy in ways that have enormous national impact—but whose members, like an independent counsel, can be removed only for good cause.[28] Surely this Court did not take pains to avoid that result in

[28] The good cause removal standard was drawn from the tenure provisions of the independent agency laws and added to the independent counsel statute in 1982 at the suggestion of the Department of Justice with the express purpose of ensuring the Act's constitutionality. S.Rep. No. 496, 97th Cong., 2d Sess. 17 (1982).

Bowsher v. Synar, 106 S.Ct. at 3188-89 & n.4, only to accept it here.

Even if one assumes that criminal law enforcement is by nature an "executive" function, one may still doubt that the Faithful Execution Clause precludes giving any such enforcement duty—however temporary, episodic, and focused—to an officer who can be removed by the Attorney General only for cause.[29] That clause speaks not of criminal law enforcement per se but of execution of the law, in all its manifold forms, as distinguished from the enactment or adjudication of the laws. Moreover, the clause indicates the Framers' intent to guide, not to expand executive power.[30] It is thus more a source of constitutional duty than a grant of exclusive and illimitable authority.[31] Whatever the clause means with respect to

[29] In contrast to the President's responsibilities with respect to the military, foreign affairs, and the granting of pardons, Art. II, § 2, the prosecutorial function is not specifically mentioned in the Constitution. App. 108a (dissenting opinion). In describing officers who must serve at the President's pleasure because "their acts are his acts," Chief Justice Marshall gave as an example those officers who conduct foreign affairs. *See Humphrey's Executor*, 295 U.S. at 630-31 (discussing *Marbury v. Madison*). The majority below may accordingly be on firmer ground in supposing that Congress could not make all foreign policy and diplomatic officials below the Secretary of State judicially appointed officers removable only for cause. App. 40a. But the extrapolation from foreign affairs to law enforcement entails a vast leap.

[30] In reaction to the excesses of the deposed King James II, Parliament declared in the first article of the English Bill of Rights that "the pretended Power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal." W. & M., Sess. 2, c.2 (1689). This requirement of royal "Execution of the Laws" is the apparent source of our own Faithful Execution Clause. *See* Reinstein, *An Early View of Executive Power and Privilege: The Trial of Smith and Ogden*, 2 Hastings Const.L.Q. 309, 320-23 & n.50 (1975).

[31] *See* Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum.L.Rev. 353, 384 (1927) ("The language of duty rather than of power was employed advisedly in this clause").

an executive obligation to enforce the laws, such an obligation plainly does not require limitless removal power and surely does not leave the President's choice of means for enforcing the law unfettered. The constitutional command that the President "take Care that the Laws be faithfully executed" resonates in the removal power context as a negative principle: it requires that those with executive functions have a measure of independence from the other branches, not necessarily a degree of dependence upon the President. Compare *Myers* and *Bowsher*, where congressional participation in removal was invalidated, with *Humphrey's Executor* and *Wiener*, where a degree of insulation from presidential removal was upheld. *See also Synar v. United States*, 626 F.Supp. 1374, 1391 (D.D.C.) (3-judge court) (per curiam) (executive powers "cannot be conferred upon an officer who lacks the degree of independence from Congress that their exercise constitutionally requires"), *aff'd*, *Bowsher v. Synar*, 106 S.Ct. 3181 (1986).

In an effort to lodge the prosecutorial power firmly in the Faithful Execution Clause, the majority below turns to history, positing that "the Framers must have foreseen the necessity of officers of the United States commissioned to enforce federal criminal law," and deeming it "inevitable that under the Constitution such officers must be . . . subject to the control of the President." App. 52a. Yet the First Congress discerned no constitutional difficulty in reposing the appointment of federal marshals and prosecutors in the district courts.[32] And, even though Congress ultimately decided to provide for their appointment by the President and the Senate, the original part-time, fee-for-service federal prosecutors remained virtually autonomous.[33]

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[32] See note 6 and accompanying text and note 16, *supra*.

[33] *See* L. White, *The Federalists: A Study in Administrative History* 406-08 (1948). "Contacts between the district attorneys" and the federal government in the capital were "largely fortuitous." *Id.* at 408. This situation contrasted starkly with the degree of

Unable to extract a convincing argument for unbounded presidential removal power over all law enforcement officials from the Constitution's text or from the Framers' own vision of the prosecutorial power, the majority below makes its last stand on the "concept of a responsible and accountable unitary executive," App. 29a. But as the panel's own discussion makes plain, App. 27a, the Constitution's adoption of a unitary rather than a plural executive was a rejection, at the apex of the federal hierarchy, of governance by a "council of state" or by parliamentary ministers. That overarching organizational principle hardly buttresses the court of appeals' conclusion about the contours of presidential power to remove a temporary special prosecutor.

The most troubling aspect of the court of appeals' "unitary executive" argument is its notion of accountability. The court's ideal seems to be a world in which the President must remain "the visible target" for public outrage whenever a particular prosecutorial decision "is contrary to the mores and customs of the community," App. 27a. But it is one thing to say that a President cannot, by use of "anonymous directorates" or "impenetrable bureaucracies," *id.*, escape responsibility for the conduct of his subordinates, and another to say that the President has a constitutional obligation to *embrace* a conflict of interest—inimical both to his faithful execution of the law and to his subordinates' rights—when the conduct of those subordinates is questioned.

As this Court has often recalled, "[t]he men who met in Philadelphia in the summer of 1787 were practical

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control the Executive maintained over foreign affairs: "Unlike the consuls, for example, the district attorneys apparently received no standard instructions, nor did they render annual or other regular reports." *Id.* Presidential control of law enforcement was further diluted by the routine resort of federal departments and local officers alike to the hiring of private attorneys as "special counsel" to prosecute the government's causes. *Id.* at 407, 409; H. Cummings & C. McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 225, 229 (1937).

statesmen, experienced in politics," *Buckley v. Valeo*, 424 U.S. at 121. They were also men of great and subtle imagination. It simply cannot be that, having endowed Congress with the flexibility and versatility to meet unforeseen challenges—so that this constitutional order might endure for the ages—the Constitution now requires this Court to abrogate a law responsibly enacted to address a recurring conflict-of-interest quandary that inheres not in the Constitution itself, but in human nature. The dilemma of conflicting loyalties that arises when a President and his Attorney General are required to prosecute their subordinates is not some Homeric tragic flaw that the Executive Branch must abide, though it lead to its destruction, nor is it a bitter cup that cannot be taken from the Executive's lips. As Justice Brandeis noted in his dissent in *Myers v. United States*, "if . . . adequate means are denied to the President, the fault will lie with Congress." 272 U.S. at 292. Here, Congress has provided the means.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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